

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 03-12288-WRS

Chapter 11

CULVERHOUSE INC.,

Debtor

**MEMORANDUM DECISION**

This Chapter 11 case came before the Court for an evidentiary hearing on the objection of G.E. Capital Corporation to confirmation of the Debtor's Plan of Reorganization on November 15, 2004. (Doc. 237). The Debtor was present by counsel Collier H. Espy, Jr., and its President Robert Culverhouse. G.E. Capital was present by counsel Chris Mims. The Court heard testimony from Robert Culverhouse and the argument of counsel. Both parties have submitted post-hearing briefs. (Docs. 329, 336). For the reasons set forth below, the objection of G.E. Capital is OVERRULED and the Chapter 11 Plan is CONFIRMED.

The Debtor filed a voluntary petition in bankruptcy on October 1, 2003. (Doc. 1). On May 4, 2004, the Debtor filed a disclosure statement. (Doc. 208). The Court conditionally approved the disclosure statement by its order of May 17, 2004. (Doc. 212). As no objections were filed the disclosure statement was approved without any opposition.

A total of six objections to confirmation of the Debtor's Plan were filed, as follows: (Doc. 234—Internal Revenue Service); (Doc. 237—G.E. Capital Corp.); (Doc. 238—Paccar Financial); (Doc. 239—Wells Fargo Financial); (Doc. 240—U.S. Bancorp Equipment Finance, Inc.); (Doc. 241—Greentree Servicing, LLC). In response, the Debtor filed a total of four amendments or addendums to the original plan. (Docs. 248, 273, 320, 322). On August 2, 2004, the Bankruptcy

Administrator filed her analysis of the plan wherein she recommended that the Plan not be confirmed. (Doc. 265).

Confirmation of the Debtor's Plan was originally scheduled for July 7, 2004. (Doc. 212). That hearing was continued several times while the Debtor attempted to come to terms with its creditors and the Bankruptcy Administrator. Through this process of amendment and negotiation, the Debtor managed to satisfy everyone except for G.E. Capital Corp. On September 22, 2004, the Court entered an order scheduling the objection of G.E. Capital for an evidentiary hearing on November 15, 2004. (Doc. 298).<sup>1</sup>

As all of the other matters have been resolved, it is necessary only to discuss the matter of the Objection of G.E. Capital. (Doc. 237). On October 25, 1999, GE Capital and the Debtor entered into a lease of five 2000 Kenworth trucks. The lease calls for monthly payments in the amount of \$9,433.79. The Debtor is approximately \$75,000 in arrears on its lease payments. The Debtor proposes to assume the lease as it is using the trucks in its business. The Debtor proposes to continue to make the monthly payment, plus an additional \$4,000 per month to cure the delinquency. This would leave a balloon payment of \$5,337.90 due at the end of the lease.

This Chapter 11 case is somewhat out of the ordinary in that the question of whether the objection of GE Capital should be sustained turns on the question as to whether the Debtor may assume the unexpired lease. Objections to confirmation of a Chapter 11 plan are governed by the

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<sup>1</sup> The September 22, 2004 Order also provided that the Debtor's Objection to Claim of the Internal Revenue Service would be heard on November 15 as well, however, the Debtor announced that it was abandoning its objection. Accordingly, it was not necessary to hear that matter.

provisions of 11 U.S.C. § 1129, while the assumption of an unexpired lease is governed by the provisions of 11 U.S.C. § 365(a).

Subject to the Court's approval, the Debtor may assume an unexpired lease. 11 U.S.C. § 365(a). The Debtor must "promptly cure" the default and provide "adequate assurance of future performance under the lease." 11 U.S.C. § 365(b)(1). The Court is, in general terms, familiar with the Debtor's condition. The Debtor's operations appear to be profitable at this time. (Doc. 316). A substantial portion of the lease delinquency came about as a result of the termination of the Debtor's contracts with Saturn Transportation, which is the subject of Adversary Proceeding 04-1010. Considering the testimony of Robert Culverhouse, having reviewed the Debtor's operating reports and given its general knowledge of the Debtor's business through the course of this Chapter 11 case, the Court finds that the Debtor has made a showing of "adequate assurance of future performance."

The remaining condition of a "prompt cure" is, admittedly, something of a problem. The \$4,000 additional payment will require approximately 18 months to fully cure the delinquency. The Court notes that the lease in question has been in place for five years. The useful life of a truck is between five and seven years. If the Court does not permit the Debtor to affirm the lease and continue to use the trucks, the reorganization will fail. In previous proceedings the Court had inquired as to whether the Debtor could return the trucks to G.E. Capital and obtain trucks from another source and was advised that they could not. Thus, there appear to be only two alternatives: (1) confirm the Debtor's Plan and permit assumption of the lease; or (2) deny confirmation and liquidate the Debtor's assets. The Court has considered a third alternative, a

cure which is “more prompt.” The problem with this third alternative is that it would call for greater monthly payments which would make the plan less feasible. This is admittedly a close call, but the Court is of the view that, considering all of the evidence and all of the facts which have come to the Court’s attention throughout these proceedings, that the proposed cure is sufficiently prompt so as to come within the outer bounds of the requirements of § 365(b)(1).

G.E. Capitol argues that the proposed cure is not “prompt” and that for this reason the plan should not be confirmed. When Congress enacted § 365 it did not attempt a precise definition of the term prompt. Rather, the determination of what is prompt varies with the facts and circumstances of each case. To be sure, in some factual settings, a cure which would require 18 months would not be prompt. This Chapter 11 case has been going on for a year, therefore an 18-month period in the context of this case is not an extremely long period of time. Second, the lease in question appears to have been made for a period of time covering the useful life of the trucks in question. It does not appear that it was contemplated that G.E. Capitol entered into this lease with a view to make another use of the trucks. The Court further notes that G.E. Capitol did not produce a witness of its own to give testimony as to what it considers prompt in the context of this case. Rather, its sent local counsel who did nothing more than quarrel with Mr. Culverhouse as to what is or is not prompt. Had G.E. Capitol made a stronger evidentiary showing, the Court may have viewed this matter differently.

The Court has observed the progress of this case from its inception. The Debtor has overcome considerable difficulty and appears to have a good chance to make this case work. The Debtor’s president has appeared in Court on several occasions and given testimony which the Court has credited as both competent and credible. Indeed, at the November 15, 2004 hearing,

G.E. Capitol did not question Robert Culverhouse's credibility. While they appeared to accept the truth of his testimony, their dispute was in the conclusions drawn. All things considered, it appears to the undersigned that the cure of the delinquency is sufficiently prompt under the unique facts of this case and that this Chapter 11 Plan should be confirmed. The Court will enter separate orders overruling the objection of G.E. Capitol and confirm the plan as amended.

Done this 6<sup>th</sup> day of December, 2004.

/s/ William R. Sawyer  
United States Bankruptcy Judge

c: Collier H. Espy Jr., Attorney for Debtor  
Chris Mims, Attorney for GE Capital  
Teresa R. Jacobs, Bankruptcy Administrator